

YAVAPAI COUNTY ATTORNEY'S OFFICE
JOSEPH C. BUTNER SBN 005229
DEPUTY COUNTY ATTORNEY
255 East Gurley Street
Prescott, AZ 86301
Telephone: 928-771-3344
ycao@co.yavapai.az.us

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IN THE SUPERIOR COURT OF STATE OF ARIZONA

IN AND FOR THE COUNTY OF YAVAPAI

STATE OF ARIZONA,

Plaintiff,

v.

STEVEN CARROLL DEMOCKER,

Defendant.

Cause No. P1300CR20081339

Division 6

STATE'S RESPONSE TO DEFENDANT'S
MOTION TO DISMISS OR IN THE
ALTERNATIVE FOR A WILLITS
INSTRUCTION

The State of Arizona, by and through Sheila Sullivan Polk, Yavapai County Attorney, and her deputy undersigned, hereby submits its Response to Defendant's Motion to Dismiss or in the Alternative for a Willits Instruction, with respect to the bicycle and shoe print impressions and requests that the Motion be denied. The State's position is supported by the attached Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

I. Dismissal with prejudice is not warranted.

Absent bad faith on the part of the State, failure to preserve evidence that is possibly exculpatory does not deprive a defendant of due process. *State v. Youngblood*, 173 Ariz. 502, 506, 844 P.2d 1152, 1156 (1993). As Defendant has failed to show that the State has in any way acted in bad faith, his request for dismissal with prejudice should be rejected.

1 *II. To merit a Willits instruction, Defendant must show 1) that the State failed to*
2 *preserve material and reasonably accessible evidence having a tendency to*
3 *exonerate him and 2) that the failure resulted in prejudice.*

4 Defendant claims that Yavapai County Sheriff's Office's (YCSO) failure to follow
5 Arizona Department of Safety (DPS) protocols designed for the Scientific Analysis Bureau
6 of the DPS Crime Lab entitles them to either dismissal of the charges with prejudice or a
7 *Willits*¹ instruction regarding the bicycle tire and shoe print impressions. This argument must
8 fail. The proposition that one law enforcement agency must follow the protocols of a wholly
9 separate law enforcement agency in order avoid dismissal with prejudice or a *Willits*
10 instruction is not supported by Arizona law.

11 "In order to be entitled to a *Willits* instruction, a defendant must prove (1) that the
12 state failed to preserve material evidence that was assessable and which might tend to
13 exonerate him and (2) that the failure resulted in prejudice to the defendant." *State v.*
14 *Dunlap*, 187 Ariz. 441, 463, 930 P.2d 518, 540 (App. 1996) (emphasis added); *see also State*
15 *v. Speer*, 221 Ariz. 449, 457, 212 P.3d 787, 795 (2009); *State v. Murray*, 184 Ariz. 9, 33 906
16 P.2d 542, 566 (1995); *State v. Leslie*, 147 Ariz. 38, 47, 708 P.2d 719, 728 (1985); *State v.*
17 *Perez*, 141 Ariz. 459, 687 P.2d 1214 (1984).

18
19 Here, YCSO personnel located both bicycle tire and shoe impressions on the ranch
20 land directly adjacent to Carol Kennedy's property and the same shoe impressions close to
21 the exterior door of the room where Carol was murdered. Dozens of photographs of the area
22 and the impressions were taken. Several maps which depict the path made by the bicycle tire
23 and shoe impression have been created. The State disclosed copies of all of the maps,
24 photographs and corresponding reports to the defense. The State has been unable to locate a
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26

¹ *State v. Willits*, 96 Ariz. 184, 393 P.2d 274 (1964).

1 pair of shoes in Defendant's possession which match the shoe impressions. The bicycle tire
2 impressions are similar to those made by the tires on the bicycle Defendant claimed he was
3 riding at the time of Carol's murder.

4 The State concedes the pictures could be of better quality; however, the State has not
5 "failed to preserve material evidence" and, more importantly, the quality of the State's
6 evidence is not the main consideration for a *Willits* instruction.

7
8 Indeed, in almost every case prosecuted, the claim can
9 be made that the investigation could have been better. We do
10 not believe that failure to pursue every lead or gather every
11 conceivable bit of physical evidence will require a *Willits*
12 instruction. Whether such an instruction is necessary depends
on a judgment as to how central the issue is to the case and
how much better or more important the "missing" evidence
might have been that the evidence that was introduced.

13 *State v. Willcoxson*, 156 Ariz. 343, 346-47, 751 P.2d 1385, 1388-89 (App. 1987).

14 The methodology used while taking the photographs is not central to this case
15 because the existing photographs, regardless of their quality or lack thereof, fail to
16 demonstrate any of the shoes seized from Defendant match the impressions. Better quality
17 photographs would not change this fact. Clearly, Defendant has failed to show the State
18 failed to preserve evidence that would tend to exonerate him. Absent this showing, he cannot
19 demonstrate prejudice.

20
21 Regarding the bicycle tire impressions, the State's best evidence is that these are
22 "similar" to those made by the tires on Defendant's bicycle. Obviously, Defendant has
23 benefited from any errors that may have been made during the investigation; therefore, there
24 is no prejudice.

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26 ///

Prescott, AZ 86301

Phone: (928) 771-3344 Facsimile: (928) 771-3110

CONCLUSION:

Whereas Defendant has failed to show the State failed to preserve material evidence or that, as a result, he suffered prejudice, his Motion to Dismiss or In the Alternative for a *Willits* Instruction should be denied.

RESPECTFULLY SUBMITTED this 4th day of January, 2010.

Sheila Sullivan Polk
YAVAPAI COUNTY ATTORNEY

By: Joseph C. Butner
for Joseph C. Butner
Deputy County Attorney

COPIES of the foregoing delivered this
4th day of January, 2010 to:

Honorable Thomas J. Lindberg
Division 6
Yavapai County Superior Court
(via email)

John Sears
107 North Cortez Street, Suite 104
Prescott, AZ 86301
Attorney for Defendant
(via email)

Larry Hammond
Anne Chapman
Osborn Maledon, P.A.
2929 North Central Ave, 21st Floor
Phoenix, AZ
Attorney for Defendant
(via email)

By: Deb Cornell